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No. 80-1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THOMAS WHITTY,
Petitioner,

v.

THOMAS R. ISRAEL, Warden, State Prison of Waupun, Wisconsin; and the ATTORNEY GENERAL of the State of Wisconsin,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

KIRBIE KNUTSON
Assistant Attorney General of Wisconsin

Attorneys for Respondents.

Post Office Address:

Post Office Box 7857
Madison, Wisconsin 53707

Telephone: (608) 266-8908

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STATEMENT OF THE CASE

The petitioner, Thomas Whitty, was convicted following a jury trial of first-degree sexual assault and burglary. Whitty denied the occurrence of the incident upon which the charges were based (Trial Transcript [hereinafter "T.T."]:244).

According to Frank Bauer, the eleven-year-old victim of the assault, on the night of April 9, 1977, he awoke to find Whitty sitting or kneeling beside his bed (T.T.:92, 99). Whitty asked Frank whether there was any money in the house and whether anyone else was there (T.T.:100). Frank answered no to both questions

and Whitty threatened to kill him if he was lying (*id.*). Whitty shoved his finger, which he said was a gun and a knife, into Frank's neck, saying, "I'll kill you, I'll kill you" (*id.*).

Whitty asked Frank if he could kiss him and suck him and, despite the boy's refusal, Whitty kissed Frank on the mouth and performed fellatio on him (T.T.:101). Whitty was in Frank's room for fifteen to thirty minutes (T.T.:102). No light was turned on in the room, but Frank could see his assailant by the light which entered the room from a large vapor light in the parking lot outside (T.T.:98, 115, 82-83). Frank was fully awake while Whitty was in his room (T.T.:118).

Before the evening of the assault, Frank had seen Whitty ten to twenty times and had talked to him ten to fifteen times (T.T.:91, 92). Most of their conversations occurred either at a go-kart track which Whitty sometimes managed and which Frank patronized or at the grocery store where Whitty worked (T.T.:92, 93). Once Frank encountered Whitty in the woods and, at Whitty's invitation, went to Whitty's house to look at coins (T.T.:92, 94-95). Whitty acknowledged that these contacts had occurred (T.T.: 260, 261). Frank knew that Whitty's first name was Tom and had noticed that Whitty spoke with a lisp (T.T.:95). Frank's sister Lisa had told him that Whitty had made sexual remarks to other children and that Whitty was "queer," but Whitty had never made any sexual proposals to Frank (T.T.:110, 111).

On the evening of the assault, Frank's mother came home at 11:30 P.M. (T.T.:47). When Frank told her about the sexual assault she called the police (T.T.:52). The police arrived at Bauers' by 11:50 P.M. (T.T.:184).

Frank told the police that he had been assaulted by "Tom Woody" who lived down by the go-kart track

(T.T.:165, 189). Frank's sister Susan said, "Oh, you mean Mr. Whitty," and Frank agreed that Whitty was the correct name (T.T.:189, 165, 152, 156, 140, 143, 130).

The police then went to Whitty's house and spent between thirty minutes and an hour talking with him (T.T.:193, 216). They told Whitty what had occurred at Bauers', but did not arrest him. The police suggested that the matter could be cleared up that night by having the boy attempt to identify Whitty (T.T.:217, 194). Whitty agreed to the confrontation (T.T.:195, 217, 270).

Whitty lived on a street four hundred yards from Frank's house (T.T.:215). The police took Whitty in a squad car to a parking lot near Frank's house where Frank viewed Whitty when Whitty was in the squad car (T.T.:220). The light was on in the car and a vapor light illuminated the parking lot (T.T.:105). Frank identified Whitty as the man who assaulted him, saying he was one hundred percent certain of the identification (T.T.:105, 220). The identification took place at approximately 2:20 A.M. (T.T.:131), three hours after Whitty had left Frank's bedroom (T.T.:47, 52).

At trial, Frank made two in-court identifications of Whitty (T.T.:91, 103).

Whitty acknowledged that he was in the bar beneath the Bauers' apartment the night of the assault, but denied being in the apartment or assaulting Frank (T.T.:244). Whitty testified that he left the bar briefly to get some fresh air (T.T.:268).

SUMMARY OF ARGUMENT

When evaluated according to the criteria established by earlier decisions of this Court, the identification of the petitioner by the boy he sexually assaulted was reliable and was properly admitted into evidence. The victim had an opportunity to observe the petitioner closely, he recognized the petitioner as an acquaintance, and he was certain of the identification.

ARGUMENT

The Court Of Appeals, Deciding A Federal Constitutional Question In A Way Consistent With Applicable Decisions Of This Court, Correctly Found That The Identification Of Petitioner Was Reliable.

The petitioner asserts that the identification procedure used in this case was unnecessarily suggestive and that the resultant identification was unreliable. The court of appeals assumed that the show-up was suggestive, but concluded that the identification was reliable.

The use of a suggestive identification procedure does not preclude the admission of reliable identification evidence. *Watkins v. Sowders*, — U.S. —, 101 S. Ct. 654, 658 (1981); *Sumner v. Mata*, 446 U.S. 1302, 100 S. Ct. 1630, 1631-32 (1980); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972). To determine whether an identification is reliable, a court considers the following elements:

1. the witness' opportunity to view the criminal while the crime occurred;

2. the witness' degree of attention to the criminal;

3. the accuracy of any description the witness gave before the confrontation;

4. the witness' level of certainty regarding any identification made at the confrontation;

5. the amount of time which elapsed between the crime and the confrontation.

Neil, 409 U.S. at 199; *Manson,* 432 U.S. at 114. Applying the *Neil* analysis, the court of appeals concluded that Frank's identification of Whitty was reliable.

1. *Opportunity to view the assailant.* There was sufficient light from the vapor light outside the window to permit Frank to see Whitty. Whitty was in the room between fifteen and thirty minutes, long enough to permit a close study of his features. Identifications based on observations of only a few minutes have been found reliable. *See, e.g., Manson,* 432 U.S. at 100-01. Frank had a chance to observe Whitty at close range when Whitty kissed him on the mouth.

2. *Degree of attention.* Although Frank was asleep when Whitty entered, he became completely alert during the course of the assault (T.T.:118). Frank obviously scrutinized his assailant more closely than would a witness who just happened to be in the vicinity of a crime. His situation was analogous to that of the rape victim in *Neil:*

> [He] was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.

409 U.S. at 200 (footnote omitted).

3. *Accuracy of description.* Frank did not need to describe the assailant's physical traits since he knew the man who entered his room and could identify him

by name. Frank told the police not only Whitty's name, which he mispronounced slightly (T.T.:165), but where Whitty lived (T.T.:189).[1]/ The court of appeals noted that Frank's offering the name enhanced the reliability of the identification. He used the correct first name and said the last name was "Woody," a name very similar to petitioner's (Petitioner's Appendix:4).

The reliability of the identification is enhanced when the one identified is known to the victim. Frank had seen and talked to Whitty on many occasions. One can be more certain of identifying someone he or she recognizes than of correctly remembering a new face. *See Ghiz v. Bordenkircher*, 519 F.2d 759, 762 (4th Cir. 1975), *cert. denied*, 424 U.S. 944 (1976); *United States v. Beckham*, 505 F.2d 1316, 1319 (5th Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Anderson*, 490 F.2d 785, 787 (D.C. Cir. 1974).

4. *Level of certainty.* During the confrontation Frank assured the police that he was one hundred percent certain that Whitty was the man who attacked him. He displayed no hesitation in making the identification. *Cf. McGuff v. Alabama*, 566 F.2d 939, 941 (5th Cir. 1978).

5. *Time between crime and confrontation.* The confrontation took place within three hours of the assault when Frank's memory was at its freshest.

Frank Bauer's identification of Whitty was reliable and was properly admitted into evidence. Frank had an opportunity to observe his assailant for an extended period in a situation which compelled his attention. He confronted the petitioner within a few

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1/*Cf. Pruitt v. Hutto*, 574 F.2d 956, 957 (8th Cir.), *cert. denied*, 439 U.S. 870 (1978), where an eight-year-old girl was found to have reliably identified her brother-in-law as the man who raped her. The girl identified him both to her mother and to the prosecutor only by his family nickname.

hours of the crime and identified him with absolute certainty.

Authorizing the showing of a reliable independent basis for the identification limits "the societal cos's imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact." *Manson*, 432 U.S. at 110. "Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.*, at 116.[2]/ Frank's identifications of Whitty were demonstrably reliable. Whitty was not denied due process by the admission into evidence of Frank Bauer's out-of-court and in-court identifications.

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[2]/ The petitioner complains that the trial court failed to give the jury a special instruction regarding identification evidence. There is no indication in the trial transcript that the petitioner either requested such an instruction or objected to the trial court's not having given it *sua sponte*. Under Wisconsin law, any objection to the absence of an instruction on identification evidence was therefore waived. *Neely v. State*, 97 Wis. 2d 38, 55, 292 N.W.2d 859, 869 (1980).

Further, the petitioner never attempted to raise this alleged error in the state courts or in the federal district court. It was raised for the first time in petitioner's statement on the need for oral argument in the Seventh Circuit Court of Appeals.

The identification here was inherently reliable and the jury was instructed that it must acquit the petitioner unless it found him guilty beyond a reasonable doubt. An instruction on identification could not have affected the outcome of the case.

CONCLUSION

The respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

KIRBIE KNUTSON
Assistant Attorney General of Wisconsin

Attorneys for Respondents.

Post Office Address:

Post Office Box 7857
Madison, Wisconsin 53707

Telephone: (608) 266-8908